No. 09-767

Supreme Court, U.S.
FILED
APR 23 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN U.S. CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

HERBERT C. SHELLEY
Counsel of Record
SHANNEN W. COFFIN
ALICE E. LOUGHRAN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
hshelley@steptoe.com

Attorneys for Petitioner

229557

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Introduction	1
Argument	3
I. Respondents Cannot Avoid the CDSOA's Viewpoint Discrimination	3
II. Respondents Fail To Explain The Conflict In The Lower Courts	6
III. Respondent Timken's Remaining Arguments Do Not Support Its Position	8
IV. The Petition Presents an Important Constitutional Question	11
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases

Baird v. State Bar of Arizona,
401 U.S. 1 (1971) 9

California Motor Transport Co. v. Trucking Unlimited,
404 U.S. 508 (1972) 5

Cathedral Candle Co. v. ITC,
400 F.3d 1352 (Fed. Cir. 2005) 9

Citizens United v. Fed. Election Comm'n,
130 S. Ct. 876 (2010) 3

Dist. of Columbia v. Sweeney,
310 U.S. 631 (1940) 12

Hoover v. Morales,
164 F.3d 221 (5th Cir. 1998) 7

Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board,
172 F.3d 397 (6th Cir. 1999),
appeal after remand,
276 F.3d 876 (6th Cir. 2002) 6

Legal Servs. Corp. v. Velazquez,
531 U.S. 533 (2001) 1, 5

Cited Authorities

Page

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 7

Rice v. Sioux City Mem'l Park Cemetery, Inc.,
349 U.S. 70 (1955) 13

Rosenberger v. Rectors & Visitors of Univ. of Va.,
515 U.S. 819 (1995) 5

Thompson v. Western States Medical Center,
535 U.S. 357 (2002) 4

Triangle Improvement Council v. Ritchie,
402 U.S. 497 (1971) 13

Constitutional Provisions

U.S. Const. amend. I ..... *passim*

Cited Authorities

Page

Statutes & Regulations

Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, tit. X, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c (2000)) ..... *passim*

19 U.S.C. § 1673 (2006) 6

19 U.S.C. § 1673a (2006) 6

19 U.S.C. § 1675c(b)(1)(A) (2000) 6

19 U.S.C. § 1675c(d)(1) (2000) 6

28 U.S.C. § 2636(i) (2006) 9

31 U.S.C. § 3730(d)(1) (2006) 5

19 C.F.R. §159.64(b)(3) (2009) 12

INTRODUCTION

This case raises an important First Amendment issue that divided the Federal Circuit: whether the federal government may limit its largesse to those who express support for a government investigation. The Continued Dumping and Subsidy Offset Act ("CDSOA" or "Byrd Amendment") denies federal funds to any applicant that failed to express support for an antidumping petition. (App. 160a-169a). The statutes' plain text differentiates speakers by viewpoint and distorts expression in the very forum established to weigh those competing views.

Respondents' defense of the ruling below only highlights the CDSOA's constitutional infirmities. Respondents liken the CDSOA to other litigation management tools governing the conduct of parties to judicial proceedings. But in none of those contexts is relief triggered by expression of particular viewpoints — or any speech content. Only by reformulating the CDSOA to deemphasize the central role played by expression in its regulatory scheme can respondents escape the strict scrutiny routinely applied to government viewpoint discrimination.

Respondents erroneously suggest that there is something unique about litigation that distinguishes it from the numerous contexts where viewpoint-discrimination is presumed invalid. But statutes that "exclude from litigation those arguments and theories Congress finds unacceptable" are no more permissible under the First Amendment than other viewpoint discriminatory schemes invalidated by this Court. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001).

Respondents rely upon a wholly hypothetical statutory purpose to circumvent First Amendment strict scrutiny. The government argues that the statutory purpose adopted below — rewarding parties that assist successful investigations — is a "constitutionally valid objective." Gov't Opp. 10-11 n.3. But it does *not* state that rewarding assistance was the statute's *actual* purpose. The government "repeatedly" denied that statutory purpose below, for good reason. (App. 65a). Response to an antidumping questionnaire is compelled by law. (App. 72a). It is nonsensical to suggest that the remedial purpose of trade laws is strengthened by providing a monetary "reward" to those already required to "assist" an investigation.

Governmental viewpoint discrimination is a matter of significant public import, and respondents cannot claim otherwise. Instead, they downplay the significance of this case principally because the statute has been repealed. Respondents admit that the repeal does not compel the denial of *certiorari*. And they overlook that the repeal was only partial; the viewpoint-discriminatory impact of the statute will be felt by a range of speakers for years to come.

Respondents do not provide a compelling reason for denying *certiorari*. This Court should grant the petition to reaffirm the important First Amendment principles at stake and correct the erroneous decision of the Federal Circuit.

ARGUMENT

I. Respondents Cannot Avoid the CDSOA's Viewpoint Discrimination

1. The CDSOA's viewpoint discrimination is patent. Both in plain language and effect, the statute limits benefit eligibility to those who publicly express support for an antidumping investigation. Respondents contend that the CDSOA's patent viewpoint discrimination can be ignored because Congress did not *intend* to burden speech in choosing a preferred viewpoint as a requirement for compensation. But when a statute makes such facial viewpoint distinctions, a court cannot look the other way. (Pet. 17-20). This Court does not permit *post hoc* judicial rehabilitation of viewpoint discriminatory statutes: "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010).

Like the majority below, respondents disregard the CDSOA's facial discrimination in favor of a wholly imagined statutory purpose — rewarding assistance of the government's antidumping investigation. For its part, the government never explicitly embraces this statutory purpose. Nor could it, since it emphatically rejected it below. App. 65a-66a. But the government "ought to say if there is merit to [its litigation position] instead of merely suggesting it," especially in the First Amendment context. *See Citizens United*, 130 S. Ct. at 892. Here, the government's defense is grounded in a

statutory purpose that it has affirmatively rejected.[1] Stripped of this artifice, its opposition crumbles.

The government's ambivalence is understandable. The reward purpose is implausible, given that "all members of the affected domestic industry are *required* to submit questionnaire responses, and the [ITC] can issue subpoenas to obtain any information that it needs." App. 106a, 107a (Linn, J., dissenting). Providing a monetary reward does nothing to enhance the participation of producers whose participation is already compelled by law; thus, the "reward" justification is wholly disconnected from the statute's stated purpose of "strengthen[ing]" the "remedial purpose" of federal trade laws. CDSOA, § 1002(5), 114 Stat. at 1544A-73 (App. 161a). The statute's compensation scheme depends not on the "assistance" provided, but on the *viewpoint* expressed in response to the questionnaire's "support" question. This Court's jurisprudence plainly prohibits this viewpoint discrimination. *See* Pet. 14-16.

2. Respondents equate the CDSOA's "support" requirement with other litigation contexts, such as class actions or *qui tam* statutes, in which relief is awarded

---

1. The government argues that courts are not limited to purposes that the government endorses. It offers a constrained reading of *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), to suggest that a court may hypothesize purposes for a statute in First Amendment analysis. We are unaware of *any* case where this Court has hypothesized a benign statutory purpose to *avoid* strict scrutiny *entirely*. Where this Court has applied heightened First Amendment scrutiny, numerous cases, including *Thompson*, require the Court to discern the *actual* statutory purpose. *See* Pet. 22.

based on litigation *conduct*. But none of those unrelated litigation tools depend in any measure on the content of protected speech. The grant of *certiorari* in this case will not affect the ability of a court to control the conduct of parties in cases before it.

Respondents' implicit suggestion that the First Amendment has less force in the adjudication (or quasi-adjudication) context than elsewhere is simply false. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972). The government can no more reward a preferred viewpoint in adjudication than it can in funding college newspapers. *Compare Velazquez*, 531 U.S. at 546, *with Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 828-830 (1995).

The CDSOA's support requirement bears no resemblance to these litigation tools. In each, the award of monetary benefits or sanctions depends upon *conduct*, such as filing of suit on behalf of the government or making an election to opt in to a class. The False Claims Act, for instance, grants an award to a *qui tam* relator who successfully *prosecutes* a claim on behalf of the United States, permitting a relator to share in the recovery in an amount "depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1) (2006).

By contrast, the fulcrum of the CDSOA's support requirement is the *expression* of opinion. The CDSOA does not limit relief to those who "opt in" to the group

seeking relief,[2] but instead, ties relief to the expression of "support" for the petition. 19 U.S.C. §§ 1675c(b)(1)(A), (d)(1) (2000) (limiting award to producers who speak in "support of the petition" by "letter or through questionnaire response") (App. 162a, 165a). The government conceded below that the CDSOA is "'not that similar'" to *qui tam* cases. (App. 87a) (Linn, J., dissenting). The litigation analogs do not save the CDSOA from invalidity.

II. Respondents Fail To Explain The Conflict In The Lower Courts

The petition explains that the decision below conflicts with decision of other circuits in similar circumstances. (Pet. 26-33). Respondents seek to distinguish the most analogous case — *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999) — by arguing again that the litigation context is somehow different. *See* Gov't Opp. 15; Timken Opp. 25. But for the reasons already stated, litigation offers no refuge for viewpoint discrimination. *Lac Vieux* is in direct conflict with the decision below. *See* Pet. 27-29.

---

2. Timken's suggestion that the support requirement merely rewards those who "opt in" to the relief sought in an antidumping petition mischaracterizes antidumping investigations. An antidumping petition is filed "'on behalf of an industry,'" meaning "'the domestic producers as a whole of a like product,'" not on behalf of an individual producer. (Timken Opp. 4). The antidumping statute thus seeks to remedy injury to the whole domestic industry. *See* 19 U.S.C. §§ 1673, 1673a (2006). Petition supporters do not "elect" to be included in the class seeking relief; nor can those opposing a petition "elect" to be excluded.

Respondents both mischaracterize *Hoover v. Morales*, 164 F.3d 221 (5th Cir. 1998), and fail to appreciate its significance. *Hoover* concerned a state appropriations statute that withheld funding for state employees who offered expert testimony against the state. *Id.* at 223-24. It was not a complete ban on speech. *See* Gov't Opp. 16; Timken Opp. 26. *Hoover* conflicts with the court of appeals' reasoning that viewpoint discrimination is more tolerable in the litigation context.

Oddly, respondents argue that lower court confusion in the application of the commercial speech doctrine does not justify review here. Both respondents concede that the court below applied intermediate "commercial speech" scrutiny. But neither respondent argued below that the commercial speech doctrine was applicable, and Timken US Corporation ("Timken") expressly asserted that it was not. App. 79a (Linn, J., dissenting). Respondents claim there is no conflict created by the decision below, however, because this case actually has nothing to do with commercial speech. That a court of appeals would apply commercial speech analysis to a statute that all parties recognize has nothing to do with commercial speech only reinforces the need for review here. *See* App. 107a (Linn, J., dissenting).[3]

---

3. SKF USA does not concede that the CDSOA would survive intermediate scrutiny. Even under commercial speech standards, the government may not discriminate against viewpoint. *R.A.V v. City of St. Paul*, 505 U.S. 377, 388-89 (1992). As Judge Linn concluded below (App. 80a-81a), Congress could conceivably have furthered the remedial purposes of the trade laws in a manner that does not depend upon the content of speech.

III. Respondent Timken's Remaining Arguments Do Not Support Its Position

1. Timken attempts to denigrate the value of SKF USA's expressed viewpoint, emphasizing that SKF USA's foreign affiliates were among the exporters on which antidumping duties were imposed. It contends "there is no injustice in giving the CDSOA its remaining effect" to deny such distributions to affiliated domestic companies. (Timken Opp. 28). Timken sheepishly acknowledges in the margin that its own predecessor (Torrington Company) "had foreign affiliates in one or more of the countries covered by the petition" that were "subject to coverage by the relevant orders." (Timken Opp. 7 n.4). Timken itself has other foreign affiliates that export products subject to similar antidumping orders. Yet Timken does not suggest any injustice in its sharing in CDSOA distributions.

As Timken's receipt of CDSOA distributions illustrates, the CDSOA does not permit the government to deny distributions simply because a qualified domestic producer has foreign affiliates. The test is one of expression, not corporate relationships. But even if the statute did consider such relationships, SKF USA "had no production facilities" in Japan (Timken Opp. 7). SKF USA was not "aligned" with any exporter subject to the antidumping order in this case. The ITC determined that SKF USA is part of the injured domestic industry, a decision that was affirmed on appeal. *See* Pet. 9 n.7.

2. Timken suggests that the petition should be denied on the ground that the CDSOA does not condition distribution of funds on the *public* expression of views,

arguing that a producer's response to an ITC questionnaire is confidential. The ITC's implementation of the CDSOA abrogated that confidentiality, however. As Timken acknowledges (Opp. 6 n.3), petition supporters must waive confidentiality in order to receive CDSOA distributions. An applicant does not qualify without agreeing to the government's publication of the applicant's support for the petition. *See Cathedral Candle Co. v. ITC*, 400 F.3d 1352 (Fed. Cir. 2005). SKF USA itself waived confidentiality in applying for distributions in 2005. (Timken Opp. 6). Its opposition was necessarily made a matter of public record under the CDSOA.

Even if the questionnaire response remained confidential, the question presented would be no less important. The impermissible burden on SKF USA's speech does not depend on whether that speech was intended for the general public. Viewpoint discrimination is equally impermissible where speech is solicited by the government: The government "may not inquire into a man's views . . . solely for the purpose of withholding a right or benefit because of what he believes." *Baird v. State Bar of Arizona*, 401 U.S. 1, 7 (1971). It would be passing strange if the First Amendment tolerated viewpoint discrimination in a forum in which the government's principal role is as neutral factfinder. *See* Timken Br. 17 (agencies have no "predetermined position" on issues).

3. Timken's baseless statute of limitations defense under 28 U.S.C. § 2636(i) should not affect the grant of *certiorari*. The Federal Circuit properly rejected the defense. As Timken acknowledges, that decision should

not be impacted by the "distinct limitations issue" at issue in *Lewis v. City of Chicago*, No. 08-974 (Timken Opp. 32 n.16).

Timken's limitations argument misunderstands both the nature of SKF USA's claim and the operation of the CDSOA. SKF USA challenges the government's denial of CDSOA distributions with respect to a particular fiscal year, 2005. When the CDSOA was enacted in 2000 — and even when the ITC's first list of affected domestic producers was published in 2001 — it was unknown whether any CDSOA distributions would actually be available in any given future year. If, for example, the exporters subject to an antidumping order discontinue dumping, no funds would exist for CDSOA distributions for that fiscal year. *See* App. 25a.

The Federal Circuit thus properly concluded that SKF USA's claim could not accrue until June 1, 2005, when U.S. Customs and Border Protection ("Customs") published its notice of intent to distribute duties for fiscal year 2005. (App. 24a-26a). Before then, SKF USA could not have "known whether Byrd Amendment distributions would be available." (App. 25a). SKF USA's October 2005 complaint was well within the 2-year limitations period. *Id.*

The government does not endorse Timken's statute of limitations defense on the merits, but simply notes that the Court's disposition of *Lewis* "may bear on the proper resolution of the timeliness issue in this case." Gov't Opp. 18. The government actually supported the *Lewis* petitioners in arguing that the statute of limitations at issue there permitted a challenge to the

government's application of the testing scheme years after the test's adoption. In any event, Timken is surely correct that the decision in *Lewis* will not necessarily affect the outcome under the distinct statutory language here. The statute of limitations defense should not impact the *certiorari* decision.

IV. The Petition Presents an Important Constitutional Question

Respondents' opposition does not rebut the critical importance of the question presented. As *amici* confirm, the CDSOA has had a profound impact on the competitive environment in a range of industries. In the furniture industry, CDSOA distributions significantly exceed the annual net operating income for the entire industry in some years. Ashley Furniture *Amici* Br. 7. One furniture company is set to receive 2009 distributions of approximately twice its 2008 net income. *Id.* at 8. In the crawfish industry, one small business was forced into bankruptcy after its domestic competitors used their CDSOA distributions repeatedly to underbid it. Giorgio Foods & PS Chez Sidney *Amici* Br. 5-6.

SKF USA suffers a significant competitive injury as a result of its protected speech. Customs has notified SKF USA that approximately $70 million is set aside for SKF USA for fiscal years 2005-forward. That money will go directly to its domestic competitors if the lower court decision is allowed to stand.

Despite respondents' vague assertions, the overall fiscal impact of the CDSOA's viewpoint discrimination

is significant. Based on figures from Customs' annual disbursement reports,[4] SKF USA estimates that, for 2008-2009 alone, Customs has set aside an additional $150 million to be distributed to the remaining plaintiffs in 48 other cases currently stayed in lower courts.[5] The government could also recoup funds wrongfully paid to affected producers in prior years under 19 C.F.R. §159.64(b)(3) (2009).

The CDSOA's burden on speech will continue to be felt as long as duties collected under orders subject to its terms are disbursed. *See* Pet. 35-36.[6] The uncertainty that the Federal Circuit's decision injects into this important segment of the national economy itself is cause for review.

The partial repeal of the CDSOA does not diminish the importance of the First Amendment challenge.[7] The

---

4. *Available at* http://www.cbp.gov/xp/cgov/trade/ priority_ trade/add_cvd/cont_dump/.

5. Prior years' amounts also count in the millions, but cannot be determined from public reports.

6. On April 14, 2010, the European Union announced that it would resume retaliatory tariffs against the country's use of the Byrd Amendment. *See* http://eur-lex.europa.eu/LexUri Serv/LexUriServ.do?uri=OJ:L:2010: 094:0015:0018:EN:PDF (EU Commission announcement).

7. Timken asserts (Opp. 26) that the partial repeal counsels against certiorari. Two of its cases concerned non-constitutional challenges to statutes that were completely (not partially) repealed and replaced with new laws. *See Dist. of Columbia v. Sweeney*, 310 U.S. 631 (1940) (meaning of "domiciled" in repealed

(Cont'd)

government confirms the continuing coercive power of the statute by highlighting that the questionnaire responses were submitted years ago. (Gov't Opp. 16). The retroactive application of this statute to responses submitted more than a decade before its enactment creates a continuing chill on protected speech. The message to industry is clear: today's questionnaire responses could someday determine tomorrow's eligibility for significant monetary distributions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT C. SHELLEY
Counsel of Record
SHANNEN W. COFFIN
ALICE E. LOUGHRAN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
hshelley@steptoe.com

Attorneys for Petitioner

(Cont'd)

tax statute); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971) (interpretation of federal-aid highway statute). A third did not concern a repealed statute at all *See Rice v Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70 (1955) (post-grant discovery of state statute providing remedy for alleged discrimination).